OCCUPATIONAL AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v. OSHRC Docket No. 06-1735

HARRY C. CROOKER & SONS, INC.

Respondents.

APPEARANCES:

Merle D. Hyman, Esq.
Office of the Solicitor
U.S. Department of Labor
John F. Kennedy Federal Building
Room E-375
Boston, Massachusetts 02203
For the U.S. Department of Labor

James A. McCormack, Esq.
Taylor, McCormack & Frame, LLC
4 Milk Street, Suite 302
Portland, Maine 04101

For the Employer

BEFORE: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review a citation issued by the Secretary of Labor ("Secretary"). The citation

alleges that respondent, Harry C. Crooker & Sons, Inc. failed to comply with 29 U.S.C. §1926.600(a)(6)[1] which requires compliance with 29 C.F.R. §1926.550(a)(15)[2]

A hearing was held in Portland, Maine on April 24, 2007. The parties have filed both opening and reply briefs and this case is now ready for disposition.

BACKGROUND

The basic facts are not in dispute and were largely stipulated by the parties[3]. Respondent

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[1] **§1926.600 Equipment.**

(a) *General requirements.*

* * *

(6) All equipment covered by this subpart shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

[2] **§ 1926.550 Cranes and derricks.**

(a) *General*

* * *

(15) Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet

[3] The stipulations were agreed upon prior to trial and are found in the Joint Pre-trial Statement dated April 10. 2007. (Tr. 24). The stipulations, as amended, stated:

(a) Crooker pipe crew foreman and 17 year employee Tracy Thomas was operating the 330 Cat Excavator, whose boom was within 6-7 feet of an energized 240 volt service drop line at location on Jordan Avenue, Brunswick, Maine, on or about May 16, 2006.

(b)Harry C. Crooker & Sons is engaged in business affecting interstate commerce.

(c) Respondent has not applied to OSHA for a variance from compliance with 29 C.F.R. 1926.600(a)(6) which references 29 C.F.R. 1926.550(a)(15).

(d) Respondent has an office and place of business at 103 Lewiston Road, Topsham, Maine.

(e) On May 16, 2007, Compliance Officer Steven Warner conducted an inspection of Respondent's worksite at 59 Jordan Ave., Brunswick, Me.

(f) If a violation of 29 CFR 1926.600 (a)(6) is found, the proposed penalty of $2800 is appropriate.

(g) 1) Title Title 35-A MRSA sec 751 *et seq* is a Maine statute entitled "Overhead High-Voltage Line Safety Act".

2) Respondent's 330 CAT Excavator is "covered equipment" as defined in sec 752(1) of the above Act.

3) The above Act precludes covered equipment from coming within "10 feet of an overhead high-voltage line" during construction activities.

4) An "overhead high-voltage line" is defined in the above Act as "all above-ground bare or insulated electrical conductors of voltage in excess of 600 volts measured between a conductor and the ground, that are owned or operated by a transmission and distribution utility' with some exceptions not factually relevant to this matter.

5) Harry C. Crooker & Sons is a "person" as defined by sec 752(3) of the above Act.

(h) On or about May 16, 2006, Harry C. Crooker & Sons was involved in a project replacing storm drain, water and sewer pipe on both sides of Jordan Avenue underneath sidewalks, paving the road and sidewalks, and installing granite curb.

(i) The owner of the above project was the Town of Brunswick, Maine.

is engaged in a business affecting interstate commerce (Stipulation (b)). On May 16, 2006, compliance officer Steven Warner conducted an inspection of respondent's worksite in Brunswick, Maine, where it was engaged in a street reconstruction project. The project required new storm drainage and underdrain on both sides of the road, sewer and water rehabilitation, new granite curbing, new sidewalks, and new gravel base for the entire road and new paving (Tr. 86, Stipulation (h)). The worksite was dynamic and moved as the project progressed (Stipulation (j)). Equipment used included several different sized backhoes, a couple of front-end loaders, at least one or two bulldozers, motor graders, pavers, rollers of assorted sizes and pavement reclaimers (Tr. 87). The compliance officer observed respondent's pipe crew foreman and 17 year employee Tracy Thomas operating a 330 Cat Excavator, whose boom was within 6-7 feet of an energized 240 volt service drop line that fed electricity from the main distribution line to a home on Jordan Avenue, Brunswick, Maine. (Stipulation (a)). The service drop line was 14 feet above the ground. (Respondent Exhibit (hereinafter" Ex. R") 6, p.5) However, much of the equipment, including the excavators was over 11 feet tall (Tr. 88). As a result of the compliance officer's observations, respondent was issued a citation alleging a serious violation of 29 C.F.R. §1926.660(a)(6).[4] A penalty of $2,800.00 was proposed.

DISCUSSION

A. Is the cited Construction Industry standard inapplicable because a more specifically applicable General Industry standard applies?

"Construction work" is defined at 29 C.F.R. §1926.32(g) as "work for construction, alteration, and/or repair, including painting and decorating." There is no dispute that the respondent's activities on the day of the inspection constituted "construction work." Nevertheless,

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(j) The nature of the work done at the Jordan Avenue project involved a dynamic job site that moved as the project progressed.

(k) The project required compliance with trenching standards promulgated by OSHA.

[4] Respondent was originally issued Citation 1, item 1 for a violation of 29 CFR 1926.550 (a)(15)(i) on June 5, 2006. OSHA withdrew that citation on September 18, 2006 and reissued on September 19, 2006 to allege a violation of 29 CFR 1926.600(a)(6) which requires compliance with the requirements of 1926.550(a)(15). Due to a typographical error, the actual citation listed the standard as 1920.600(a)(6) with a correct instance description. Complainant filed an unopposed motion to amend the citation and complaint to correctly identify the standard as 1926.600(a)(6). Said motion was granted in January, 2007.

respondent argues that the cited construction industry standard is inapplicable to its worksite. According to respondent, the general industry standard at 29 C.F.R. §1910.333 should have been cited because, under §1926.600(a)(6), compliance was infeasible. Specifically, respondent notes that §1910.333(a)(1) requires that live parts to which employees may be exposed be deenergized "unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations." Respondent contends that this feasibility consideration is specifically applicable here where, as will be discussed *infra*, it argues that due to the height of the equipment, it was not feasible to maintain a 10 foot clearance from the service drop lines. (Respondent's Brief at 15).

Respondent also points to other provisions of §1910.333 where, it argues, under circumstances specifically applicable here, it is not required to maintain a 10 foot clearance. For example, respondent notes that §1910.333(c)(3)(ii) permits "qualified"[5] persons to operate within the 10 foot barrier. Indeed, for lines carrying 300 volts or less, "qualified" operators are advised merely to "avoid contact." (Respondent's Brief at 16).

Respondent also points to an Interpretive Letter issued by the Secretary on December 7, 1999 wherein, it is claimed, the Secretary specifically stated that §1910.333(c)(3)(iii) applies to the operation of mechanical equipment, such as cranes, near overhead power lines. (Respondent's Brief at 15).

Finally, respondent recognizes that 29 C.F.R. §1910.5(c)(1) states that:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation or process.

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[5] A "qualified person" is defined at §1910.399 as:
"one familiar with the construction and operation of the equipment and the hazards involved."
However, §1910.332(b)(3) also states that for purposes of compliance with §§1910.331-1910.335:

Additional requirements for qualified persons. Qualified persons (i.e. those permitted to work on or near exposed energized parts) shall, at a minimum, be trained in and familiar with the following:

(i) The skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment.

(ii) The skills and techniques necessary to determine the nominal voltage of exposed live parts, and

(iii) The clearance distances specified in §1910.333(c) and the corresponding voltages to which the qualified person will be exposed.

Respondent asserts that its operator was a "qualified person." However, given the disposition of this case, it is not necessary to determine whether the operator was "qualified" within the meaning of the standard.

However, respondent calls attention to §1910.5(c)(2) which states that

> On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in subpart B or subpart R of this part, to the extent that none of such particular standards applies.

Respondent interprets 29 C.F.R. §1910.5(c)(2) as modifying §1910.5(c)(1) to allow the general industry standard to apply where it is not feasible to apply the specific industry standard. (Respondent's Brief at 12).

Respondent's arguments are without merit. There is no disagreement that, under §1910.5(c)(1), standards promulgated for a specific industry preempt general industry standards that address the same conditions. *Daniel Construction Co.*,10 BNA OSHC 1549, 1554-55 (No. 16265, 1982). However, respondent notes that "[i]t is well settled that a general standard prescribing compliance action is not preempted by a specific standard unless both address the same particular hazard." *Brock v. Williams Enterprises of Georgia, Inc and OSHRC*, 832 F.2d 567, 570 (11th Cir. 1987). While respondent's recitation of the law is correct, the fault in its argument is that both standards address the same hazard: the hazard of electrocution by contact with power lines. That it may be infeasible to comply with the specific industry standard does not mean that the standard does not address the hazard.

Moreover, respondent's interpretation of §1910.5(c)(2) as allowing the application of a general industry standard when it is impractical to apply a similar standard promulgated for a specific industry, finds no support in either the regulations or the case law. Contrary to respondent's assertion, the purpose of §1910.5(c)(2) is to make it clear that the general industry standard applies only when no specific industry standard addresses the condition.

As noted by the Third Circuit:

> The general safety standards complement the specific safety standards. . . by filling the interstices necessarily remaining after promulgation of the specific standards. The Secretary cannot be expected to have anticipated every conceivable hazardous situation in promulgating specific standards.

Dravo v. OSAHRC and Marshall, 613 F.2d 1227, 1234 (3d Cir. 1980).

Clearly, §1910.5(c)(2) was not intended as a convenience to the employer to enable it to

pick and chose the standard with which compliance would be easiest. To hold otherwise would add a level of subjectivity in the application of the standards that would only confuse employers in their attempt comply with the Act.

The interpretative letter of Dec. 12, 1999 does not mandate a different result. Respondent correctly notes that the letter states that §1910.333(c)(3)(iii) applies to the operation of mechanical equipment, such as cranes, near overhead power lines. (Respondent's Brief at 15). A complete reading of the letter, however, makes it clear that it applies to such equipment only when not engaged in construction work.

B. Did Respondent establish that it was in compliance with the standard because the service drop lines were appropriately insulated?

Respondent next asserts that the service drop line was insulated and, therefore in compliance with §1926.550(15), which requires that an appropriate clearance from power lines be maintained

> *Except* where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines. . . (emphasis added)

Explicitly written as an exception to the standard, respondent has the burden of establishing that it applies. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993). Respondent has not met its burden.

OSHA Interpretation Letter of August 9, 2004 states that whether factory-installed insulation can be a sufficient "insulating barrier" depends on two factors: (1) whether the employer has sufficient information to confirm that the factory-installed insulation is sufficient to prevent the passage of current and is intact, and (2) whether, in light of the circumstances (including the type of equipment and tools being used) it is reasonably foreseeable that the insulation would be damaged while doing the work.

Respondent notes that the covering on the line was rated at 600 volts (Tr. 75). Therefore, it asserts that the covering constituted insulation of the service drop lines, which carried only 240 volts. While respondent established that the covering on the lines was *rated* at a level that would constitute insulation within the meaning of the exception, it failed to adduce any evidence that

the *condition* of the line was such that it was capable of providing the rated insulation. As the Secretary also noted in her Interpretation of August 9, 2004: "[i]n most cases the employer will not be able to determine if such a line has sufficient insulating properties (both with respect to the type of insulation and its condition) to prevent electric shock without consulting the utility owner-operator."

In her Affidavit of May 3, 2007, Carol Purinton, the Service Center Manager for the Brunswick District of Central Maine Power Company (CMP) attested that the two current carrying lines that comprise CMP's triplex service drops have a plastic covering factory rated to 600 volts. However, she also stated that "CMP's work practice is to consider the service drop as not insulated, requiring personnel to maintain established clearance or use appropriate personal protective equipment. CMP does not consider the plastic covering as protection for its employees, members of the public or contactors working near these lines." (Ex. R-12)(emphasis in original).[6]

Respondent's own witness, OSHA consultant and former compliance officer Skip Hoyt stated in his report that "[s]ervice entrance lines are manufactured with insulation suitable for the voltage they carry. *However, the insulation breaks down with climatic exposure and over several years the insulation may crack or even break off the lines.* Therefore, the utilities and OSHA treat all service entrance lines as uninsulated." (Ex R-9 at 3). (emphasis added) He concluded:

"There are too many variables associated with this type of exposure to predict the consequence of contact with a service entrance by a heavy piece of construction equipment such as a crane, backhoe or truck. *The prudent rationale is to expect the worse and abate accordingly*." (Ex. R-9 at p.4)(emphasis added).

Moreover, in his report, OSHA Compliance Assistance Coordinator, Kenneth Mastrullo, noted that "It is standard utility practice that service drop conductors are covered not insulated. The covering on this type of power line has no insulating value and provides no protection for workers against electrical shock or electrocution." (Ex C-1 at 3). He also stated that "[t]ypically, the electric power lines are covered, which does not provide safety for workers. The covering on the electric power lines provide extended life for the equipment and does not provide safety for

[6] This exhibit was accepted into the record after completion of the hearing.

the workers." (Ex. C-1 at 5).[7]

Finally, at the hearing, Skip Hoyt testified that CMP considered their service drop lines to be uninsulated for "liability purposes." (Tr. 82). Hoyt elaborated:

> They want to make sure that anybody that could potentially contact one of their service drops treats it as an uninsulated line so that if there's an accident they're not liable.
> (Tr. 82).

This judge is not prepared to say that covered lines that are not sufficient to be deemed insulated for liability purposes are sufficient when the lives of employees are at stake.

Accordingly, I find that respondent failed to establish that the covering on the service drop lines provided insulation sufficient to constitute an exemption from the cited standard.

C. Prima Facie Case

To establish that an employer violated a standard, the Secretary must prove as part of her *prima facie* case that :1) the standard applies to the cited conditions; 2) the terms of the standard were violated; 3) one or more of the employer's employees had access to the cited conditions; and 4) the employer knew or with the exercise of reasonable diligence, could have known of the violative conditions. *Ormet* Corporation, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991); *North Berry Concrete Corp.*, 13 BNA OSHC 2055, 2056 (No. 86-0163, 1989).

As found *supra*, the cited standard applies to the condition. Moreover, there is no dispute that respondent operated its 330 Cat Excavator within the 10 foot clearance required by the standard.(Stipulation (a), Tr. 8, 15). The record also establishes that respondent's foreman, Tracy Thomas, was operating the excavator. (Stipulation (a)). The actual or constructive knowledge of a foreman or other supervisory employees can be imputed to the employer. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-0369, 1991). Finally, respondent does not dispute that its employees were exposed to the conditions. (Stipulation (a)). Had the excavator boom contacted the crane, the results could have been death or serious physical harm, including electrocution (Tr. 29-30, 35). Accordingly, the Secretary met her burden and established a *prima facie* violation of the standard. Although the Secretary established a *prima facie* violation, respondent

[7] At the hearing, Mastrullo testified that he determined that he determined that the line was not properly insulated by examining a photo of it through a magnifying glass. The record does not indicate what he observed to lead him to that conclusion. Accordingly, in reaching my decision, I give no weight to that statement.

argues, as an affirmative defense, that the citation should be vacated because compliance with the cited standard was infeasible.

D. Did Respondent establish as an affirmative defense that compliance with the cited standard was infeasible?

To establish the affirmative defense of infeasibility, the burden is on the employer to show that "(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection." *Southern Pan Services Co.*, 21 BNA OSHC 1274, 1278 (No. 99-0933, 2005); *Star Brite Construction Co.*, 19 BNA OSHC 1687, 1690 (No. 95-0343, 2001); *V.I.P. Structures, Inc.*, 16 BNA OSHC, 1873, 1874 (No. 91-1167, 1994).

If literal compliance is not feasible, the employer must abate or reduce the hazard insofar as possible, even if exact compliance is not possible. *Peterson Brothers Steel Erection Co. v. SOL*, 26 F.3d 573, 579 (5th Cir. 1994). The burden is on the employer to establish either that an alternative protective measure was used or that there were no feasible alternative measures. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1228 (No. 88-821, 1991).

It is respondent's contention that given the low height of the service drop line (14 feet), it was not feasible for its excavator and other machinery to maintain a clearance while performing the necessary work. (Respondent's Brief at 20). However, compliance officer Steve Warner testified that there was a method that would enable it to perform the necessary work while maintaining the required clearance. The compliance officer, testified that compliance could have been achieved by moving the excavator further from the wire, then moving it out to the spoil pile in the center of the road and crawling around under the south side of the wire, where it was highest, and over to the east side where the spoil pile could be dragged out and placed into a front end loader to finish the job (Tr. 109, 116, 126; Ex. C-4).

At the hearing, respondent introduced no evidence to rebut the compliance officer's testimony. Rather it attacked his experience; and focused especially on the fact that he never

operated any of the machinery in question (Tr. 112, Respondent's Reply Brief at 7). At the hearing, I took note of the compliance officer's lack of hands-on experience with the machine and held that I would accord his testimony the appropriate weight (Tr. 115). In its brief, respondent asserts that this alternative method of operation "is technically impossible and ultimately unsafe" for a series of "self-evident reasons." (Respondent's Reply Brief at 6). While respondent finds it "self evident" that the compliance officer's suggestion was infeasible and dangerous there is nothing in the record to support this conclusory statement.

Although the compliance officer had no hands-on experience with the machinery at issue, he has 27 years experience and has conducted over 2000 inspections, including over 200 that involved trenches (Tr. 110-111). He was familiar with the operation of the equipment through extensive OSHA training, and has "been to every school OSHA has to offer." (Tr. 113).

I find that the compliance officer's training and experience qualified him to offer his opinion as to alternative methods of operation and that his opinion is entitled to some weight. While I might have accorded more weight to contrary testimony from and experienced operator, such testimony was never offered, leaving the compliance officer's testimony to stand unrebutted. On this record, therefore, I must conclude that the Secretary established that there was a feasible means of complying with the standard. Accordingly, respondent's affirmative defense of infeasibility is rejected.[8]

Assuming, *arguendo*, that the compliance officer's suggested method of operation to achieve literal compliance with the standard was not feasible, I would find that respondent failed to establish that it undertook feasible alternative measures to protect its employees from the hazard addressed by the standard. As noted, *supra*, in order to prevail on the affirmative defense of "infeasibility," the burden is on the employer to demonstrate that it either attempted to comply with the standard insofar as feasible or undertook feasible alternative measures to protect its employees from the hazards addressed by the standard.

[8] In support of its defense of infeasibility, respondent argues that given the low elevation of the drop lines and the height of its machinery, it could not even bring its machinery onto the site without violating the clearance requirements of the construction standards. (Respondent's Brief at 19). This is a red herring. Respondent was not cited for failure to maintain appropriate clearance while traveling to the site. Rather it was cited for violating the clearance requirements when working at the site. There is no indication that the Secretary would find it appropriate to cite a clearance violation while traveling to the site and to presume so is mere speculation. Indeed, such a citation would involve a different standard (§1926(a)(15)(iii)), have to stand on its own merits, and is not relevant to the failure to maintain proper clearance while working.

The Secretary asserts that one of the alternative measures to maintaining a proper clearance is to have the lines deenergized (Tr. 27). It is undisputed that, prior to the inspection, respondent made no effort to have the lines deenergized (Tr. 96). However, it is respondent's position that deenergization was not a feasible alternative. It notes that, in her affidavit of May 1, 2007, Carol Purinton stated that CMP requires as much as 2-3 weeks prior notice for deenergization and that such a method is the least preferred method of protection. (Ex. R-12). Indeed, Purinton could not remember an instance where deenergization was requested for the type of job at issue. Respondent's Superintendent testified that, although he did not attempt to have the lines deenegized before the inspection, he did call CMP to deenergize some lines one week before the hearing, but that CMP refused to do so (Tr. 96-97).

In her affidavit, Carol Purinton outlined procedures for responding to a request for deenergization. In sum, once a request is received, an appointment is scheduled for the matter to be handled by a line supervisor or safety specialist. Depending on the time of the year, workload and resources it could take a few days for this to be arranged. Purinton also noted that "While CMP has historically not been disconnecting service(s) for road/sewer jobs, if this practice becomes the norm, CMP is concerned that it could result in an increase in customer complaints because of the outages incurred and from contractors because of the potential delays in responding to their requests." (Ex. R-12 at 4).

She stated that, if the lines are to be deenergized, a line crew may be scheduled to disconnect the lines while the contractor did his work. CMP would likely bill the contractor for such costs.[9] Also, notice would also have to be given to the customers. The length of the notice depends on the duration of the interruption and number of customers affected. If the interruption affects more than 10 customers or lasts more than 3 hours, reasonable notice is 3 days if feasible, but 24 hours at a minimum. In other cases, reasonable notice means as soon as possible. (Ex R-12 at 2-3).

However, Purinton also stated that, if contacted about working near energized lines, a determination would be made, after consulting with the job foreman as to what work they will be

[9] There is no evidence that any costs passed to respondent would render compliance economically infeasible. Similarly, requiring respondent to have the lines deenergized would not render it noncompetitive since all employers bidding for the job would have to consider the costs of compliance. *See State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161 (Nos. 90-1620 & 90-2894, 1993)

performing and the appropriate means of protection. Denergization is the least favored option. Other options include covering up the lines, relocating the lines, or no action if the contractor can maintain the 10 foot clearance by other methods, such as using different equipment. (Ex. R-12 at 2).

Purinton's affidavit establishes that, even if CMP determined that deenergization was not feasible, a line supervisor would consider other options to reduce or eliminate the electrocution hazard.[10] The critical point here is that, prior to the inspection, respondent made no attempt to contact CMP, and therefore failed to take the necessary first step to having the utility assist it to achieve at least feasible alternative compliance. Having failed to contact CMP to determine, at a minimum, what feasible alternative methods of protection could be utilized, respondent cannot now assert that no such feasible means of alternative abatement existed. While such methods may not include deenergization, the process of determining a feasible alternative method of abatement cannot begin until CMP is first notified. Here, respondent never contacted CMP.

I also note that, in his report, respondent's witness, Skip Hoyt, observed that respondent could have satisfied OSHA by using a trained and authorized observer to ensure that the equipment never came with 4-6 feet of an energized line.[11] (Ex. R-9 at 4). Although I venture no opinion as to whether the appointment of an observer would have avoided a citation, I do note that such a measure would have constituted a feasible means of alternative abatement. Again, however, respondent took no such action.

Not only has respondent failed to establish that there were no feasible means of alternative abatement, but to the contrary, the record clearly demonstrates that there were several steps respondent could have taken to, at least, minimize the hazard to its employees. It failed to undertake any of these measures and, therefore, has not established the affirmative defense of "infeasibility."

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[10] When seeking an alternative method of abatement, employers must exercise some creativity in seeking to achieve compliance. *Star Brite Construction Co* 19 BNA OSHC at 1691.

[11] Hoyt noted that §1926.550(a)(15(iv) permits use of an observer under certain circumstances. That standard provides:

> A person shall be designated to observe clearance of the equipment and give timely warning for all operations where it is difficult for the operator to maintain the desired clearance by visible means…

PENALTY

The parties stipulated that, if a violation is affirmed, the proposed penalty of $2,800.00 is appropriate. (Stipulation (f)). There is nothing in the record to indicate that the penalty is inappropriate under section 17(j) of the Act , 29 U.S.C. 666(j).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Accordingly, it is ORDERED that the serious citation for violation of 29 U.S.C. §1926.600(a)(6) is AFFIRMED and a penalty of $2,800.00 is ASSESSED.

_/s/_____

Covette Rooney
Judge, OSHRC

Dated: September 4, 2007
Washington, DC